

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

Tony Fountain #152157

Plaintiff,

VS.

DR. PEASANT, et al,

Defendants.

2008 MAY 29 A.D. Case No.: 2:06-CV-548-MH
MURKIN, CLERK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

-T.

OBJECTION TO MAGISTRATE JUDGE

RECOMMENDATION OF MAY 13th, 2008

Comes now Tony Fountain, by and through himself hereby Objects to Magistrate Judge Recommendation of May 13, 2008. And asserts the following facts in support of (E) his objection to wit:

MAGISTRATE ACT

- 1). Plaintiff Contends to the furthest that his claims of violation of his Eighth Amendment Rights and Deliberately Indifferent against DR. peasant and warden, FORN, is the subject of Magistrate Recommendation is not properly pending before this court. Due in parts to facts that the prior magistrate judge, Hon. Susan Russ Walker acted outside of her authority. when she decided to Entertain Plaintiff original

Filed Motion FOR an Emergency INjunction Filed on June 11, 2006. Plaintiff Stress the point that Such decision was in direct Conflict with the United States Magistrate Act, 28 U.S.C.S. 636(b)(1) (A), that Read in pertinent part:

"A Judge may designate a magistrate [magistrate judge] to hear and determine any pretrial matter pending before the Court, Except a motion for injunction relief."

Plaintiff Contends that this matter was not properly referred to Magistrate Judge SUSAN RUSSELL WILDER. See Civil Investigative Demand No. 98-19 (1998, Ed. Va) 182 FRD 196, also see United Steelworkers of America v. Bishop (1979, CAS. Alz) 598 F.2d. 408.

2). And not only did the magistrate acted outside of her Authority in Entertaining his motion FOR an Emergency INjunction, but when is far to decide a DEPOSITIVE MATTER, By RULING on plaintiff Motion to proceed IN forma pauperis STATUS in this case. Something the magistrate yet don't allow without the Consent of plaintiff. Tripathi v. Rison 847 F.2d. 548 (CA9, 1988).

Plaintiff, Maintains his argument that Magistrate Judge SUSAN RUSSELL WALTER, didn't have the Authority to Grant nor Deny his Motion to proceed IN FORMA PAUPERIS STATUS without his consent. AMBROSE 729 F.2d. at 1085; Alanz, 690 F.2d. at 729; PROWS V. KESTNER 842 F.2d. 138 (5th Cir. 1988).

3). Plaintiff also asserts the facts that he submitted INTERROGATORIES to DR. peasant, DR. Miller and DR. T.O. Bianchi, pursuant to Rule 33 of Fed.R.Civ.P. along with a request for Admissions pursuant to Rule 36(e)(b) Fed.R.Civ.P.. In which when unanswered, never ruled upon by the defendant peasant or his Agents acting in direct concert with him. Therefore, his unanswered admission should have been admitted, pursuant Rule 36 (e)(b) Fed. R.Civ.P.

Plaintiff Denied Motion
To Amend

4). Plaintiff stress the facts that on September 5th 2006 he filed a "Motion to amend" this action and on October 11th 2006 his Motion to Amend was Denied as a whole. (See Doc. no. 35-1 page 1 of 3) Contrary to Magistrate TERRY F MOORES Interpretation set forth in his Recommendation of May 13th 2008 (Doc. # 65-1 page 1 of 6 foot note #2).

point being one (1) year and (7) seven months has past Since the Court denied plaintiff motion to amend was filed and denied. First Sav. Bank, F.S.B. v. United States Bancorp (1998, DC Kan) 184 F.R.D 323. Plaintiff contends this Court waited until the Eleventh hour to grant plaintiff motion to amend, when it was convenient and necessary to do so. By attempting to interpret this Court Earlier ORDER denying my motion to amend (see Doc. # 35 page 3) to have read "To the extent plaintiff motion to amend, however, seeks to amend the Complaint to include a claim for Damages, the Motion to amend the relief sought in this action shall be Granted".

Plaintiff, contends this Court order of October 11th 2006 did not read such interpretation of the magistrate Recommendation of May 13th 2008. (see Doc. # 65-1 page 1 of 16). Which would now, deprive plaintiff of his rights to procedural due process as was guaranteed by the Fourteenth Amendment to United States Constitution and Article I, § 6 of the Alabama Constitution of 1901. Ex parte Weeks 611 So.2d. 255(AZ. 1992); Pike v. Southern Bell Telephone & Telegraph Co

263 A.D. 58, 8150-2d. 25c1 (1985). In other words Plaintiff stresses the fact that had his motion to amend been properly decided/granted as the magistrate so gently suggested in his recommendation (see Doc. # 65-1 page 1) Plaintiff would have chosen a different course of argument. Suprae weeks.

Opposition To Magistrate
Recommendation on Deliberately
Indifferent

Plaintiff, contends that magistrate judge, was contrary to the law on what constitute Deliberately Indifferent. And the United States Supreme Court held in the case of Helling v. McKinney 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d.22 (1993), That a prison inmate need not wait until the harm they suffer from the lack of medical attention is so egregiously as to independently shock the conscience. If the medical system provided inmates by the state presents a grave and immediate health danger to the physical well-being. Campbell v. Beto 460 F.2d. 765 at 768 (1972). Surely the symptoms plaintiff was complaining of seeing clots of blood in his stool was of a grave concern to plaintiff health and well-being. These type of symptoms are even known to a layed person to rise to the

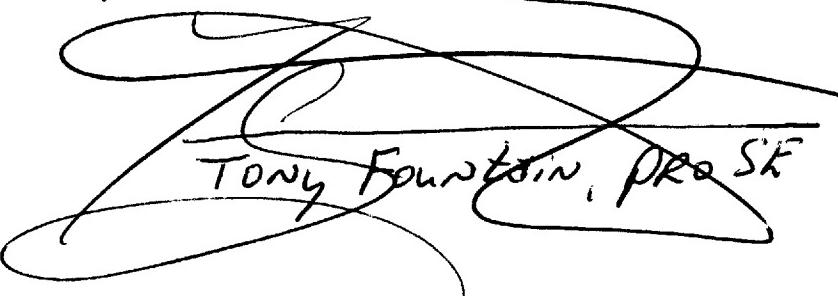
OF & Serious Need For Medical Attention. Estelle v. Gamble 429 US 97, 106 (1976). And had the defendants been make to answer the Submitted Interrogatories and Request for Admissions Filed by Plaintiff prior to this Magistrate Recommendation of May 13, 2008 it would have shown the two(2) polyps removed from Plaintiff Colon was and is the direct cause of cancerous in nature. See Gamble.

Objection Concerning
Eye Care

Plaintiff, maintained the same standard of medical care/attention applies to Eye care, and the defendants neglected to provide plaintiff with eyeglasses. Plaintiff asserts the facts that he were finally seen by an eye doctor on or about March 2008 and was diagnose as being nearsighted. Harris v. O'Grady 803 F.Supp. 1361, 1366. And the facts that he was denied eyeglasses for two(2) years and was force to borrow another inmate eyeglasses in order to initiate and complete my legal work pending before this Court, contrary to the magistrate recommendation of May 13 2008. (Doc. # 65-1 page 4 of 16, footnote) Surely the borrowing of another inmate eyeglasses in order to read legal mail, letters from family's & friends, and writing was so shocking to public conscience. Gamble 429 US 97.

WHEREFORE, Plaintiff, prays that (s) his objection
be in all respects "Granted" as law and justice
requires.

Done on 25th Day OF May 2008,


Tony Fountain, Pro Se

CERTIFICATE OF SERVICES

I, hereby, Certify, that I have served a true
and correct copy upon all parties to this
action as addressed:

OFFICE OF ATTORNEY General

11th South Union Street

Montgomery, Al. 36130

to
Law Office
Porterfield, Harper, Mills & Motlow, P.A.

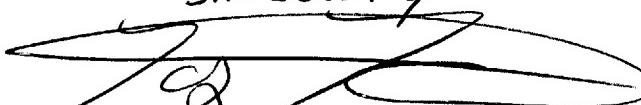
22 Inverness Center Parkway
Suite 600

P.O. Box 530790

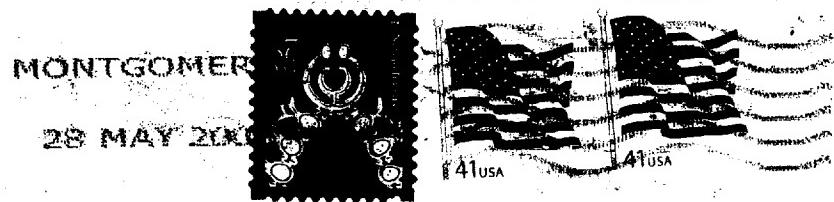
Birmingham, Al. 35253-0790

by placing the same in the U.S. Mail (certified) on this
25th day of May 2008.

Sincerely



Tony Fountain #152157
Stalton Correctional Facility
P.O. Box 56, B1-93A
Elmore, Al. 36025



OFFICE OF THE CLERK
United States District Court

P.O. Box 711

Montgomery, Al. 36101-0711

3619140711